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IN THE

Supreme Court of the United States

October Term, 1952

No. 623

L. B. BINION, alias BENNY BINION, *Petitioner,*

v.

UNITED STATES OF AMERICA, *Respondent.*

Case No. 13,655, in United States Court of Appeals for Ninth Circuit

PETITION FOR REHEARING ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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Petitioner respectfully prays for a rehearing and reversal of the order entered on April 13, 1953, denying his petition for a writ of certiorari to the United States Court of Appeals for the Ninth Circuit.

In support of this petition for rehearing, petitioner urges the following two substantial reasons for issuance of a writ of certiorari, neither of which was presented to this Court in the original petition:

1. This Court should issue a writ of certiorari in this case to decide the basic issue of whether the lower courts

are precluded from questioning the constitutionality of any of the mandatory provisions of the Federal Rules of Criminal Procedure in view of their promulgation by this Court.

2. This Court should issue a writ of certiorari in this case to decide where the alleged crime of income tax fraud is committed when a taxpayer delivers his return to the wrong Collector, and, if the alleged crime is committed where the return was required to be filed, whether such a taxpayer's constitutional rights are violated by removal to a Federal Judicial District which does not have jurisdiction of the alleged crime, where the removal is under color of an invalid Federal indictment procured to circumvent the extradition procedure between States.

REASONS FOR GRANTING THIS PETITION

I.

This Court Should Issue a Writ of Certiorari in This Case to Decide the Basic Issue of Whether the Lower Courts Are Precluded From Questioning the Constitutionality of Any of the Mandatory Provisions of the Federal Rules of Criminal Procedure in View of Their Promulgation by This Court.

Rule 40(b)(3) provides, without exception, that, "If the prosecution is by indictment, a warrant of removal shall issue upon production of a certified copy of the indictment and upon proof that the defendant is the person named in the indictment". The promulgation of this rule, with no provision for exceptions in any case, amounts essentially to a declaratory judgment or an advisory opinion by this Court that in no case will a defendant's constitutional rights be violated by removal if the formalities of an indictment and an identification of the defendant are observed. It is submitted that, because of

this Court's adoption of this flat interpretation of the Constitution, the lower courts feel powerless to decide that the mandatory provisions of Rule 40(b)(3) are unconstitutional in any situation, regardless of the circumstances. This was, in fact, the position taken by the Ninth Circuit in this proceeding. Notwithstanding that the petitioner's memorandum in opposition of motion to dismiss appeal from the District Court judgment specifically raised the question of the constitutionality of Rule 40(b)(3) [R. 233-238], the Ninth Circuit called the defendant's appeal frivolous because it was made in the face of the mandatory provisions of Rule 40 [R. 241].

This decision by the Ninth Circuit highlights a basic issue implicit in the adoption by this Court of abstract rules of criminal procedure. If this decision is sound, the adoption of such rules necessarily prejudged constitutional issues which had not been presented on their facts and which might not even have been thought of. This issue was raised by Mr. Justice Frankfurter in stating his reasons for not approving the adoption of the Federal Rules of Criminal Procedure:

> "And this leads to another strong reason for not charging this Court with the duty of approving in advance a code of criminal procedure. Such a code can hardly escape provisions in which lurk serious questions for future adjudication by this Court. Every lawyer knows the difference between passing on a question concretely raised by specific litigation and the formulation of abstract rules, however fully considered by members of the lower courts and the bar. I deem it unwise to prejudge, however, unintentionally, questions that may in due course of litigation come before this Court by having this Court lay down rules in the abstract rather than deciding issues coming here with the impact of actuality and duly contested." (Memorandum Opinion on Order of December 26, 1944, Adopting Criminal Rules)

The question of whether the lower courts are entitled to exercise their judgment as to the constitutionality of

the mandatory provisions of Rule 40(b)(3) or of any other mandatory provision of the Federal Rules of Criminal Procedure in the context of the facts and circumstances of the case in which the constitutional issue is raised, or whether they are bound by the predetermination of all such issues by this Court through its adoption of the Federal Rules of Criminal Procedure is an important question of Federal law which has not been, but should be, settled by this Court. See Rule 38(5)(b) of the Supreme Court Rules.

Furthermore, if this Court should make the issuance of writs of certiorari, in cases challenging the constitutionality of provisions of the Rules of Criminal Procedure, dependent on the usual test of conflict between the circuits, it would be virtually impossible for this petitioner or any other petitioner challenging the constitutionality of such provisions to obtain a writ of certiorari because of the natural inclination (if not an actual or assumed legal compulsion) on the circuit courts to support the constitutionality of rules adopted by this Court. Thus it was that this Court granted certiorari on a petition for rehearing in *Schriber-Schroth Co. v. Cleveland Trust Co.*, 305 U.S. 47, 83 L.Ed. 34, upon a showing that a conflict of decision was improbable.

In this connection it will be noted that only one lower court has, so far, had the temerity to challenge the constitutionality of a mandatory provision of the Rules of Criminal Procedure adopted by this Court. In *United States* v. *Bink*, 74 F. Supp. 603, the District Court for the District of Oregon refused to accept jurisdiction under Rule 20. Subsequently, however, even this District court has bowed before the force of this Court's adoption of the Rules, stating, in *United States* v. *Tollett et al.*, 76 F. Supp. 871,

> "The Court therefore advises the Clerk to forward certified copies in accordance with the express com-

> mand of the Rule [Rule 20]. Neither this Court nor the Judges nor the Clerk defy this mandate even in view of doubts as to validity."

In this case, petitioner alleges that the mandatory provisions for removal under Rule 40(b)(3) are being deliberately misused to circumvent his constitutional rights under the Fifth Amendment. He alleges that an invalid indictment is being used to force his return to the jurisdiction of the State of Texas, thus depriving him of the due process of extradition. This is a novel situation. So far as counsel for the petitioner has been able to ascertain, there are no reported cases in which an invalid indictment for a federal crime has been used as a device to force the extradition of an individual to another state so that he may be tried in the state courts. It is virtually certain that such a misuse of the federal process was not envisioned at the time the mandatory removal provisions of Rule 40(b)(3) were adopted by this Court.

It is the position of this petitioner that the lower courts should not be precluded from protecting the constitutional rights of an individual in a situation of this type, and it is submitted that a writ of certiorari should issue in this case in order to make it clear that this Court did not intend to prejudge every constitutional issue which might conceivably arise through the mandatory application of the Rules of Criminal Procedure promulgated by it.

II.

This Court Should Issue a Writ of Certiorari in This Case to Decide Where the Alleged Crime of Income Tax Fraud Is Committed When a Taxpayer Delivers His Return to the Wrong Collector, and, If the Alleged Crime Is Committed Where the Return Was Required to Be Filed, Whether Such a Taxpayer's Constitutional Rights Are Violated by Removal to a Federal Judicial District Which Does Not Have Jurisdiction of the Alleged Crime, Where the Removal Is Under Color of an Invalid Federal Indictment Procured to Circumvent the Extradition Procedure Between States.

Section 53(b)(1) of the Internal Revenue Code, relating to the place for filing individual income tax returns, provides as follows:

> "Sec. 53. Time and Place for Filing Returns.
> "(a) • • •
> "(b) To Whom Return Made.—
> "(1) Individuals.—Returns (other than corporation returns) shall be made to the collector for the district in which is located the legal residence or principal place of business of the person making the return, or, if he has no legal residence or principal place of business in the United States, then to the collector at Baltimore, Maryland."

Article III, Section 2, clause 3 of the Constitution provides that trial shall be held in the state where the crime was committed. The Sixth Amendment to the Constitution provides that the accused in a criminal prosecution is entitled to trial by a jury of the state and district where the crime was committed.

Failure to file a form is a crime committed where the form should have been filed. *United States* v. *Lombardo*, 241 U.S. 73, 60 L.Ed. 897; *New York C. & H.R.R.* v. *United States*, 166 F. 267.

The words "shall be made" in section 53(b)(1) mean "shall be filed"; to file a paper is to deliver it; and, when the mails are used, filing takes place upon delivery at the office of the official required to receive it. *Wampler* v. *Snyder*, 66 F. (2d) 195. In that case the court said, "The office of the collector, as we have seen, is in the city of Baltimore in the state of Maryland. It is there *and nowhere else* that the return 'shall be made' . . ." (emphasis supplied).

Mere delivery of a false income tax return to a person other than the person with whom it is required to be filed does not change the venue of the crime. In *Bowles* v. *United States*, 73 F. (2d) 772, the defendant was convicted in the Maryland Judicial District for making a false and fradulent return to the Collector in Baltimore. Defendant was a resident of the District of Columbia, which is in the Baltimore Collection District, and actually gave his return to a subordinate Bureau official in the District of Columbia. However, the court said, ". . . the taxpayer is *required* to make his return to the Collector for the district in which is located his legal residence or principal place of business . . . The offense having been committed in the state of Maryland where the Collector's office is located and where the return *should be filed*, it follows that the District Court of the United States for the District of Maryland had jurisdiction of the offense charged." (emphasis supplied).

Similarly, mere delivery of an income tax return to a person other than the person with whom it is required to be filed does not start the running of the period of limitations on assessment. *W. H. Hill Co.* v. *Commissioner*, 64 F. (2d) 506, *cert. den.* 290 U.S. 691, 78 L.Ed. 595, and *O'Bryan Bros., Inc. et al.* v. *Commissioner*, 127 F. (2d) 645, *cert. den.* 317 U.S. 647, 87 L.Ed. 521.

It is the petitioner's contention that section 53(b)(1) of the Internal Revenue Code and the above cases show that delivery of an income tax return to the wrong Collector's office cannot result in the commission of a crime at that Collector's office. On the contrary, if a crime is committed, it is committed at the Collector's office where the return should have been filed. This is an important question of federal law which has not been, but should be, settled by this Court. In this case it is vital to the constitutional right of the petitioner to be tried in the state and the district in which the alleged crime of income tax fraud was committed.

Petitioner in this case has been indicted for filing and causing to be filed false and fraudulent income tax returns with the Collector of Internal Revenue at Dallas, Texas, for the year 1948 for himself and for his wife [R. 6-8]. Petitioner has been a resident of Las Vegas, Nevada since late in 1946 [R. 126]. The Record before this Court is blank with respect to the petitioner's principal place of business, and petitioner's counsel at the removal hearing was denied the right to cross examine the testifying Revenue Agent on any issue other than identification so it was not possible to bring out the fact that petitioner's principal place of business was not in the Dallas, Texas Collection District during 1948 and that petitioner was not even present in that district at any time during 1948 [R. 124]. Since the Record does not establish the location of the principal place of business of the petitioner, then the test of residence under section 53(b)(1) of the Internal Revenue Code must be applied. Accordingly, for the purposes of this proceeding, petitioner and his wife were required to file their income tax returns for 1948 with the Collector of Internal Revenue at Reno, Nevada. Consequently, the alleged crime was committed where the returns should have been filed; the returns should have been filed at Reno,

Nevada; and the alleged crime, if any, was committed at Reno, Nevada and at no other place.

The constitutional guarantees in Article III, Section 2, clause 3 and in the Sixth Amendment to the Constitution were meant to protect an accused from unwarranted removal to an improper place for trial as well as to protect him from actual trial and conviction at an improper place. *Salinger* v. *Loisel,* 265 U.S. 224, 232-233, 68 L. Ed. 989, 997. The jurisdictional issue outlined above must be heard at the removal hearing in a case of this type, where the petitioner alleges that the indictment was obtained for improper motives relating to his removal, if petitioner is to have the benefit of his constitutional rights.

To illustrate, assume that the petitioner and his wife in this case had, in fact, actually delivered their income tax returns for the year 1948 to the Collector of Internal Revenue at Reno, Nevada, and that these returns were properly filed under section 53(b)(1) of the Internal Revenue Code at Reno. Certainly, if these had been the facts, the petitioner would have been entitled to attack in a removal hearing the validity of an indictment in the Judicial District of Northern Texas for income tax fraud for 1948, if the indictment was obtained for the sole purpose of forcing his extradition to Texas. If this be true, this Court should review the legal issue raised by the petitioner's contention in this case that his income tax return and his wife's income tax return for 1948 were required to be filed with the Collector of Internal Revenue at Reno, Nevada, and that the alleged crime, if any, took place at Reno, Nevada, since an affirmative decision on this point would place the petitioner in the same position as in the example given above.

CONCLUSION

For the reasons stated, the petitioner respectfully petitions the Court for reconsideration of his Petition for Writ of Certiorari.

Respectfully submitted,

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April 28, 1953

CERTIFICATE OF COUNSEL

I, Ellsworth C. Alvord, attorney for the petitioner, do hereby certify that this petition for rehearing is presented in good faith and not for delay, and that it is restricted to substantial grounds for issuance of a writ of certiorari which were not previously presented.

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